

1 John Furlong
2 Bar No. 018356
3 General Counsel
4 STATE BAR OF ARIZONA
5 4201 N. 24th Street, Suite 200
6 Phoenix, Arizona 85016-6288
7 (602) 252-4804

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9 **IN THE SUPREME COURT**
10 **STATE OF ARIZONA**
11

12 PETITION TO AMEND RULES 703 AND
13 705 OF THE ARIZONA RULES OF
14 EVIDENCE
15

Supreme Court No. R-_____

16 Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of
17 Arizona respectfully petitions this Court to amend Rules 703 and 705 of the Arizona Rules
18 of Evidence to more closely parallel their counterparts in the Federal Rules of Evidence.
19 The proposed amendments are shown in Exhibit A, and would make the following changes
20 to the existing rules:

21 (1) The proposed amendment to Rule 703 would expressly recognize that
22 although an expert may base an opinion on otherwise inadmissible evidence, a court has the
23 discretion not to allow the expert to disclose such evidence to the jury. The proposed
24 amendment also incorporates the factors set forth in the Federal Rule 703 for exercising that
25 discretion.

26 (2) The proposed amendment to Rule 705 would clarify currently
ambiguous language in the rule to confirm that the Rule governs only the presentation of

1 expert testimony during trial and does not affect the parties' obligation to disclose the bases
2 of an experts' opinion prior to trial.

3 Both of these proposed changes are worth adopting on its own merits, but their
4 adoption also would serve the purpose of preserving, to the extent possible, uniformity
5 between the Arizona and Federal Rules of Evidence.

6 I. INTRODUCTION

7 In 1977, the Arizona Supreme Court adopted the Arizona Rules of Evidence, which
8 were closely modeled on the Federal Rules of Evidence. Since that time, because many of
9 the Arizona Rules of Evidence remain similar to their federal rule counterparts, federal
10 decisions interpreting the Federal Rules of Evidence have provided general guidance to
11 Arizona courts in interpreting the Arizona Rules of Evidence. *See State ex Rel. Miller v.*
12 *Tucson Associates Ltd. Partnership*, 165 Ariz. 519, 799 P.2d 860 (App. 1990) (citing M.
13 Udall and J. Livermore, ARIZONA PRACTICE: LAW OF EVIDENCE §2 (2d ed. 1982)); *Goy v.*
14 *Jones*, 205 Ariz. 421, 422-23, 72 P.3d 351, 353-54 (App. 2003) (where the Arizona Rules of
15 Evidence are similar to the Federal Rules of Evidence, "federal court interpretation of these
16 rules of evidence are persuasive").

17 The Arizona and federal rules diverge in some respects, either because this Court
18 considered but decided not to adopt certain federal rule provisions or simply because this
19 Court has not had the opportunity to consider whether to amend the Arizona rules to
20 incorporate many of the federal rule amendments adopted after 1977. The two rule changes
21 proposed in this petition fall into this latter category. Both proposed changes are modest in
22 scope, and are worth adopting both because they would improve the operation of Arizona's
23 evidentiary rules and because they would foster uniformity with the federal rules.

1 **II. THE PROPOSED AMENDMENTS TO THE RULES**

2 **A. Rule 703 – Bases of Opinion Testimony by Experts**

3 Like its federal counterpart, Arizona Rule 703 allows an expert to base an opinion
4 upon inadmissible evidence so long as it is “of a type reasonably relied upon by experts in
5 the particular field in forming opinions or inferences upon the subject.” Ariz. R. Evid. 703.
6 The Arizona rule, however, does not explicitly address whether an expert may disclose
7 otherwise inadmissible evidence to the jury if prompted to do so by the party offering the
8 opinion. In contrast, under an amendment adopted in 2000, Federal Rule 703 expressly
9 limits the disclosure of such facts and data in these circumstances:

10 Facts or data that are otherwise inadmissible shall not be disclosed to
11 the jury by the proponent of the opinion or inference unless the court
12 determines that their probative value in assisting the jury to evaluate the
 expert’s opinion substantially outweighs their prejudicial effect.

13 This limitation makes explicit that a court has the discretion not to allow the
14 proponent of an opinion to disclose to a jury facts and data that would otherwise be
15 inadmissible but for the fact that they form the basis of the expert’s opinion. In essence, the
16 federal rule requires the court to conduct a balancing test similar to that provided in Rule of
17 Evidence 403 to determine whether the facts or data should be disclosed to the jury,
18 considering the probative value of that information in helping the jury evaluate the expert’s
19 opinion, the degree to which such disclosure would unfairly prejudice an adverse party, and
20 the likely effectiveness of giving a limiting instruction telling the jury that the information
21 may be considered only for the purpose of explaining the basis for the expert’s opinion. At
22 the same time, it leaves unaffected an adverse party’s right to inquire as to those facts and
23 data on cross-examination.

24 The federal amendment is worth adopting in Arizona. Practitioners have from time
25 to time argued that because Arizona Rule 703 lacks the limitation found in the federal rule,
26 otherwise inadmissible facts and data relied upon by an expert may *always* be disclosed to a

1 jury. Unfortunately, that sometimes has led litigants to attempt to use experts as mere
2 conduits to get hearsay and other inadmissible evidence before a jury. Adopting the federal
3 version of Rule 703 would provide explicit guidance to the Arizona courts not to allow this
4 abuse. Adopting the federal version of Rule 703 would, at the same time, preserve the
5 fundamental operation of Arizona Rule 703 as it currently exists.

6 The State Bar, however, suggests one modification to the federal rule's language to
7 take into account an additional consideration that arises in criminal cases. While using an
8 expert as a conduit for hearsay raises serious fairness concerns in both civil and criminal
9 proceedings, it also can raise serious concerns in some circumstances about whether it
10 violates a criminal defendant's constitutional right to confront his or her accusers. *See*
11 *Crawford v. Washington*, 541 U.S. 36, 51-53 (2004) (confrontation clause of the Sixth
12 Amendment requires courts to exclude "testimonial" hearsay, when offered against a
13 defendant in a criminal case, at least where the defense has not had a prior opportunity to
14 cross-examine the declarant at trial). To address that issue, the State Bar proposes adding a
15 clause at the end of the rule providing that in a criminal case, "[f]acts and data that are
16 otherwise inadmissible" may not be disclosed to the trier of fact unless the court *also*
17 determines that "their disclosure to the trier of fact would not violate a defendant's
18 constitutional rights."¹

19 **B. Rule 705 – Disclosure of Facts or Data Underlying Expert Opinion**

20 The differences between the Arizona and federal versions of Rule 705 are very
21 modest. The federal version allows experts to give their opinions "without first testifying
22 to" the underlying facts or data. In contrast, mirroring the language of the federal rule
23 before it was amended in 1993, the Arizona version allows experts to testify "without prior

24 ¹ One other minor modification was made to the language used in the federal rule.
25 To clarify that a court must make its determination before the disclosure takes place, the
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1 disclosure of” the facts and data underlying the expert’s opinion. The intent of both
2 versions of the rule is to allow an expert, unless a court requires otherwise, to offer an
3 opinion during his or her trial testimony without first disclosing the factual bases for the
4 opinion during his or her testimony.²

5 Although both federal and Arizona versions of the rule pertain only to the
6 presentation of expert testimony *at trial*, the Arizona version’s use of the word “disclosure”
7 inadvertently suggests that the rule also affects a party’s *pre-trial* obligation to disclose
8 expert opinions and their bases. Arizona’s version of Rule 705 was last amended in 1988,
9 prior to the adoption in 1992 of Rule 26.1 of the Arizona Rules of Civil Procedure. With the
10 adoption of Rule 26.1, the term “disclosure” has taken on new and significant dimensions
11 that could not have been anticipated at the time current Rule 705 became effective.

12 By stating that an expert’s opinion may be given without “prior disclosure of” the
13 facts and bases for the opinion, the Arizona rule is susceptible to an interpretation that the
14 disclosure of the facts and data underlying an expert’s opinion may be withheld by the
15 opinion’s proponent during pretrial discovery and need not be disclosed until the expert
16 testifies at trial. While this interpretation is wholly inconsistent with parties’ expert
17 disclosure obligations under Arizona Rule of Civil Procedure 26.1(a)(6) and Family Law
18 Rule of Procedure 49G., amending the Arizona version of Rule 705 to conform to the
19 federal version would eliminate this opportunity for mischief without working any
20 fundamental change to current Arizona practice. Notably, virtually identical concerns led to
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22 proposed rule inserts the word “first” in the last clause so that it states that “unless the court
23 *first* determines that their probative value”

24 ² See Ariz. R. Evid. Art. VII, Opinions and Expert Testimony, Preamble (“Ordinarily,
25 a qualified expert witness can be asked whether he has an opinion on a particular subject
26 and then what that opinion is. If an objection is made and the court determines that the
witness should disclose the underlying facts or data before giving the opinion, the witness
should identify the facts or data necessary to the opinion.”).

1 the amendment of the federal rule in 1993 to prevent it from being misinterpreted as limiting
2 parties' expert disclosure obligations under Federal Rule of Civil Procedure 26(a)(2). See
3 Fed. R. Evid. 705, Advisory Committee's Note to 1993 Amendment (federal rule change
4 was made "to avoid an arguable conflict" with the parties' disclosure obligations).

5 **III. CONCLUSION**

6 For the reasons set forth above, the State Bar of Arizona respectfully petitions this
7 Court to amend Rules 703 and 705 of the Arizona Rules of Evidence as set forth in attached
8 Exhibit A.

9 RESPECTFULLY SUBMITTED this 19th day of December, 2008.

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11 
12 John Furlong
13 General Counsel
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15 Electronic copy filed with the
16 Clerk of the Supreme Court of Arizona
17 this 19th day of December, 2008.

18 by: Kathleen A. Lundgren
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Exhibit A

Rule 703. Bases of Opinion Testimony by Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence; in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court first determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect and, in a criminal case, their disclosure to the trier of fact would not violate a defendant's constitutional rights.

Rule 705. Disclosure of Facts or Data Underlying Expert Opinion

The expert may testify in terms of opinion or inference and give reasons therefor without ~~prior disclosure of~~ first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

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